probably have avoided this difficulty by preserving the signed original order in the office files according to the procedure established for the OPA offices, the procedure it did follow was a common business practice. The standards imposed by the Nebraska court in this case will place formidable administrative burdens on the Omaha OPA office when it attempts to enforce either its own claims or those of aggrieved tenants arising out of OPA orders issued prior to the instant case. One might speculate that, even in the absence of a modern business records statute, an appellate court more sympathetic to the OPA might have found little difficulty in upholding the trial court in this case.

Evidence—Confessions—Coerced Confession May Be Suppressed before Indictment—[Federal].—Agents of the Federal Bureau of Investigation arrested the petitioners on the authority of a warrant issued on information and belief that the petitioners, jointly engaged in business, were knowingly in possession of goods stolen in foreign commerce. With the consent of one of the petitioners, who was the manager of the business, the agents searched the premises and seized certain documents. The petitioners were then taken to the United States Courthouse, where they were questioned individually by relays of federal agents. Continuous interrogation, ranging from six to eleven hours, elicited confessions from the petitioners. Before the grand jury took any action, a motion was made for the suppression of the documents and confessions on the ground that they had been obtained in violation of the Fourth and Fifth Amendments. The district judge refused to suppress the douments on the ground that consent had cured what was otherwise an illegal search and seizure;[1] he refused to consider the suppression of the confessions on the ground that precedent bars such relief before trial.[2] On appeal to the circuit court of appeals, *held*, a confession obtained in violation of constitutional rights may be suppressed before indictment. Order as to confessions reversed, one judge dissenting. *In re Fried*.[3]

Judge Augustus Hand, dissenting, stated that the desirability of preventing indictments based on incompetent confessions was outweighed by the necessity of not unduly burdening law enforcement officials with frequent pre-indictment and pre-trial determinations. Judge Frank, concurring in the holding, added that illegally obtained confessions should be suppressed before indictment re-

[1] A complaint based on information and belief will not support a lawful arrest. Go-Bart Co. v. United States, 282 U.S. 344 (1930); United States v. Pollack, 64 F. Supp. 554 (N.J., 1946); United States v. McCunn, 40 F. 2d 295 (N.Y., 1930); United States ex rel. King v. Gokey, 32 F. 2d 793 (N.Y., 1929).

[2] No prior case has been found concerning suppression of a confession before indictment. The holding of the district court was based on cases where suppression was unsuccessfully sought after indictment but before trial. United States v. Lydecker, 275 Fed. 976 (D.C. N.Y., 1921); Kokenes v. State, 213 Ind. 476, 13 N.E. 2d 524 (1938); People v. Nentarz, 142 Misc. 477, 254 N.Y. Supp. 574 (1931); People v. Reed, 333 Ill. 397, 164 N.E. 847 (1928).

[3] 161 F. 2d 453 (C.C.A. 2d, 1947).

gardless of whether they were obtained in violation of the Fifth Amendment[4] or a statute.[5] Judge Learned Hand, while concurring in the holding, emphasized his conviction that to suppress a confession obtained in violation of a statute as distinguished from the Constitution would "hobble the prosecution of crime by mincing the trial into successive separate determinations."[6]

Although the federal courts have allowed the pre-trial and pre-indictment suppression of documents obtained in violation of the Fifth Amendment,[7] the instant case is the first to permit the suppression of a confession at any stage previous to trial. The holding is an extension of the policy of the federal courts to safeguard constitutional rights by excluding evidence obtained in violation of those rights.

The application of the federal rules excluding illegally obtained confessions has been closely related and analogized to the rules governing the exclusion of illegally obtained documentary evidence.[8] Since *Boyd v. United States*,[9] decided in 1886, the federal courts have excluded evidence obtained in violation of the Fourth Amendment.[10] This rule of exclusion has also been applied to confessions obtained in violation of the Fifth Amendment.[11] It should be observed that these exclusionary rules are an expression of a policy of the Supreme Court, not adopted until nearly a century after the enactment of the Constitution, and not a necessary inference from the Constitution itself.[12]

Despite the over-all similarity of the rules excluding documentary evidence and confessions, the exclusionary policy has not, in all instances, been uniformly carried out by the federal courts when dealing with the two types of evidence. Thus, evidence which is the fruit of an unconstitutional search and seizure may

[4] "No person . . . . shall be compelled in any criminal case to be a witness against himself. . . . ." U.S. Const. Amend. 5.

[5] The federal rule of exclusion of illegally obtained confessions has been extended to include violations of federal statutes. McNabb v. United States, 318 U.S. 332 (1943), rehearing den. 319 U.S. 784 (1943). There is some indication of a trend to extend the rule to include also violations of state statutes. Anderson v. United States, 318 U.S. 350 (1943).

[6] 161 F. 2d 465 (C.C.A. 2d, 1947).

[7] Fed. Rules of Crim. Proc., Rule 41(e), 54 Stat. 688 (1941), 18 U.S.C.A. § 687 (Supp. 1946).

[8] All three of the opinions in the principal case use such analogies in arriving at their respective conclusions.

[9] 116 U.S. 616 (1886).

[10] Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Silverthorne v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).

[11] Bram v. United States, 168 U.S. 532 (1897); Wilson v. United States, 162 U.S. 613 (1896); Sparf v. United States, 156 U.S. 51 (1895); Hopt v. Utah, 110 U.S. 574 (1884).

[12] Waite, Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944); Harno, Evidence Obtained by Illegal Search and Seizure, 19 Ill. L. Rev. 303 (1925). A majority of the state supreme courts interpreting similar provisions in their respective constitutions have held the evidence admissible. Wigmore, Evidence 2183, 2184 (3d ed., 1940).

not be used,[13] while the reverse is true with respect to independent evidence which is the product of an illegal confession.[14] Documentary evidence secured by an unconstitutional search and seizure has been suppressed before trial[15] and before indictment,[16] whereas such evidence secured solely in violation of a state statute has not been suppressed.[17] By dictum the standard appears to be the same where a federal statute is concerned,[18] in the absence of an explicit statutory rule of exclusion.[19] On the other hand, confessions offered in a federal court have been excluded at the trial stage even if obtained only in violation of a federal statute,[20] or when obtained by state officers in violation of a state statute.[21] But, before the instant case, confessions have not been suppressed before trial for any reason,[22] except where the issue of the motion being premature was not raised.[23]

The court in the present case justifies pre-trial suppression of unconstitutionally obtained confessions as an expansion of the safeguards accorded to constitutional rights. Neither the majority nor the concurring opinion discussed the justification that previously has been given for treating confessions and documentary evidence in a different manner.[24] The line of argument running through the cases that have denied pre-trial suppression of confessions has involved two points.

[13] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Flagg v. United States, 233 Fed. 481 (C.C.A. 2d, 1916).

[14] United States v. Richard, 27 Fed. Cas. 798, No. 16,154 (C.C. D.C., 1823); United States v. Hunter, 26 Fed. Cas. No. 15,424 (C.C. D.C., 1806).

[15] Agnello v. United States, 269 U.S. 20 (1925); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914); Fed. Rules of Crim. Procedure, Rule 41(e), 54 Stat. 688 (1941), 18 U.S.C.A. § 687 (Supp. 1946). See Perlman v. United States, 247 U.S. 7 (1918).

[16] Cobbledick v. United States, 309 U.S. 323 (1940); Cogen v. United States, 278 U.S. 221 (1929); Burdeau v. McDowell, 256 U.S. 465 (1921).

[17] Olmstead v. United States, 277 U.S. 438 (1928); Valli v. United States, 94 F. 2d 687, 691 (1938); Morton v. United States, 60 F. 2d 696, cert. den. 288 U.S. 607 (1933).

[18] Olmstead v. United States, 277 U.S. 438, 468 (1928).

[19] The following provision of the Federal Communication Act of 1934 has been construed as requiring the exclusion of evidence secured in its violation: "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." 48 Stat. 1064, 1103 (1934); 47 U.S.C.A. § 605 (Supp. 1946). Nardone v. United States, 308 U.S. 338 (1939); Weiss v. United States, 308 U.S. 321 (1939).

[20] McNabb v. United States, 318 U.S. 332 (1943).

[21] Anderson v. United States, 318 U.S. 350 (1943).

[22] United States v. Lydecker, 275 Fed. 976 (D.C. N.Y., 1921); Kokenes v. State, 213 Ind. 476, 13 N.E. 2d 524 (1938); People v. Nentarz, 142 Misc. 477, 254 N.Y. Supp. 574 (1931); People v. Reed, 333 Ill. 397, 164 N.E. 847 (1928).

[23] United States v. Pollack, 64 F. Supp. 554 (N.J., 1946).

[24] See In re Fried, 68 F. Supp. 961 (N.Y., 1946); United States v. Lydecker, 275 Fed. 976 (D.C. N.Y., 1921).

First, the determination of whether a confession has been unconstitutionally extracted is more complicated than the determination of whether documents or real evidence have been unconstitutionally seized; consequently, there is greater need of a trial record in arriving at the former.[25] This assumption appears questionable. In any event, it is doubtful that any difference in the "difficulty" is sufficiently great and constant to be the basis for a different rule as to the availability of a motion to suppress.

The second argument, as expressed by the lower court in refusing suppression in the principal case, is as follows: "A decision on an application to suppress as evidence materials obtained by an unlawful search and seizure is conclusive, that is, the evidence is excluded from the grand jury or the trial if the application is successful. . . . . No such finality would attach to a pre-trial or a pre-indictment determination on a challenged confession. If the application to suppress were successful, it would, of course, be excluded. But if it were unsuccessful, the trial judge would still have to hear the challenge. . . . ."[26] Thus, the court concludes, there would be time-consuming duplication. No authority is cited for the position that the pre-trial determination would not be binding, and it may be argued that the pre-trial and pre-indictment determination could be res judicata and binding on the trial judge. But whether the disposition of the motion is considered res judicata or not, it is likely that the standard of constitutional protection is as strict as the standard of common-law trustworthiness; hence, a confession constitutionally obtained would at trial be ipso facto trustworthy. As a practical matter, therefore, the possibility of duplication appears to be largely an academic argument. In the rare case where the evidence relating to the methods used to obtain a statement of questioned trustworthiness is not the same as the evidence pertaining to the constitutional question of coercion it seems particularly desirable to separate the two inquiries. Such a situation may be presented, for example, by the use of "truth serum" when the accused allegedly assents to such use.[27]

The holding of the principal case underlines the federal policy of enforcing constitutional safeguards through the rules and procedure of the federal courts. The Supreme Court in adopting this policy has indicated that any handicapping of law enforcement officials is justified by the policy of preventing the enforcement of the law at the expense of constitutional rights. Judge Frank, however, would permit the pre-trial suppression of confessions secured solely in violation of a statute,[28] thus extending the doctrine of *McNabb v. United States*[29] which has permitted the suppression of such confessions at the trial stage. This position would seem to lack compelling policy reason, since no constitutional ques-

[25] United States v. Lydecker, 275 Fed. 976 (D.C. N.Y., 1921).

[26] See In re Fried, 68 F. Supp. 961, 963 (N.Y. 1946).

[27] See Despres, Legal Aspects of Drug-Induced Statements, 14 Univ. Chi. L. Rev. 601.

[28] In re Fried, 161 F. 2d 460 (C.C.A. 2d, 1947). [29] 318 U.S. 332 (1943).

tion is involved. Any official misconduct minor enough not to offend the Fifth Amendment hardly requires such added sanction at this stage of criminal proceedings. The *McNabb* doctrine is based, in theory, on the federal judiciary's supervising the administration of criminal justice by "establishing and maintaining civilized standards of procedure and evidence."[30] The strong practical justification of the doctrine lies in the need for discouraging the too prevalent "third degree" methods employed in coercing confessions.[31] But protection of society does not demand that prosecutors be burdened with contesting frequent petitions at pre-trial stages based only upon alleged statutory violations. The fact that such a pre-trial determination would admittedly not cause duplication at the trial, as in the case of confessions unconstitutionally obtained, is not of relevance to this consideration. In favor of Judge Frank's position is the desire to protect private citizens from the stigma of indictments based on confessions which may be suppressed at the trial under the *McNabb* rule. But such a possibility is remote since prosecutors can be relied upon to avoid indictments unsupported by admissible evidence.

It is submitted, also, that the *McNabb* doctrine should a fortiori not be extended to bar documentary and real evidence obtained in violation of a statute, even at the trial stage. The majority of statutory requirements merely state what the courts have held to be "reasonable" under the Fourth Amendment.[32] Basing exclusion of evidence on this type of statute would, therefore, require little or no deviation from present standards under the constitutional provision. There are, however, a number of statutory requirements that do not go to the "reasonableness" of a search and seizure—as delivery of a receipt for the items seized,[33] or failure of the searching officer to make a complete return.[34] This type of statute has been held ministerial only and a violation of the requirements under such statutes has no effect on the "reasonableness" of the search and seizure.[35] A mere showing that otherwise competent documentary evidence has been obtained through a statutory violation, not going to the reasonableness of the search, would allow the release of lawbreakers without the justification of safeguarding constitutional rights, or the suppression of "third degree" methods, the latter consideration being applicable to confessions exclusively.[36]

[30] Ibid., at 340.

[31] Keedy, The Third Degree and Legal Interrogation of Suspects, 85 U. Pa. L. Rev. 761 (1937); Frank, If Men Were Angels 317–324 (1942); Chafee, Pollak, and Stern, Lawlessness in Law Enforcement, Report to the National Commission on Law Observance and Enforcement No. 11 (1931).

[32] 18 U.S.C.A. § 611 et seq. (1940).

[33] 18 U.S.C.A. § 622 (1940).

[34] 18 U.S.C.A. § 623 (1940).

[35] United States v. Kaplan, 286 Fed. 963, 971 (1923); Rose v. United States, 274 Fed. 245, 250 (1921).

[36] It might be proposed to extend the McNabb doctrine to bar documentary and real evidence obtained in violation of a "substantive" statute going to the "reasonableness" of the